SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-9

No. ~~582~~

THOMAS C. LYNCH, ET AL.,

Appellants,

v.

ROBERT O. GILMORE, JR., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

REGULATIONS INVOLVED

Appellees do not agree with appellants in the citation of the regulations involved; appellees cite the following regulations:

(1) California Department of Corrections Administrative Manual Paragraphs 330.041, 330.042, and 330.043 provide:

"330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vehicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of the United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court"

"330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis."

"330.043

All State owned law books and references will be maintained in a suitable place and no State owned books or references are to be removed from the designated 'law library', except to administrative segregation units as scheduled."

(App. 41-42, 93 n. 2)

(2) California Director of Corrections Transmittal Letter 26/66, dated September 19, 1966, directed to:

"Wardens and Superintendents, Deputy Director, Correctional Conservation Camp Services Division; Chief, Parole and Community Services Division; and Staff Members"

which provides, *inter alia*, on the first page of the letter, in promulgating Administrative Manual Paragraph 330.041, set forth above:

"Paragraph 330.04, Law Books and References, is added to specify a uniform list of law books and references to be made available in each institution. These books are to be obtained from existing funds and all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed."

(3) California Department of Corrections Director's Rules Paragraphs D2601 and D2602 provide:

"D2601

LAW BOOKS. The use of institution law books by inmates is a privilege which may be withdrawn upon misuse. State-owned law books are not to be removed from the designated place of study. Personally-owned law books shall be limited by local regulations to the availability of space for personal property in the inmate's quarters. Law books in excess of this limitation may be donated to the library, sent home, or destroyed, whichever the inmate prefers."

"D2602

INMATE ASSISTANCE. One inmate may assist another inmate in the preparation of legal documents, but may not receive remuneration therefor. Remuneration is not limited to present benefits, but includes future as well as past benefits. A room or rooms may be designated by the Warden or Superintendent for this purpose. All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain."

(App. 44-45)

(4) The California State Law Library "INFORMATION FOR PRISON LIBRARIANS" provides:

"California State Library
Law Library
Library and Courts Bldg.
Sacramento, California 95809

"INFORMATION FOR PRISON LIBRARIANS

"The following sets *only* are available for circulation to prison inmates:

Title	*Abbreviation*
California Appellate Reports	CA
California Appellate Reports, 2d Series	CA 2d
California Reports	C
California Reports, 2d Series	C 2d
California Reporter	C Rptr
Pacific Reporter	P
Pacific Reporter, 2d Series	P 2d
Federal Reporter	F
Federal Reporter, 2d Series	F 2d
Federal Rules Decisions	FRD
Federal Supplement	F Supp
United States Reports	US
Supreme Court Reporter	SCt
U.S. Supreme Court Reports, Lawyers Edition	L Ed
Lawyers Edition, 2d Series	L Ed 2d
California Statutes and Amendments to the Codes	Cal Stats

Note: SCt, US, and L Ed contain the same cases. C & CA cases are found in P until 1960. After 1960 C cases are found in C Rptr and P, CA in C Rptr.

"We return cards for several reasons:

Out in circulation—Either out circulating or a duplicate request: we do not reserve books for inmates.

Not in State Library—Incomplete set for prison circulation. (See attached page for listing of missing volumes)

Return for more complete information—Incorrect citation or insufficient information.

Not for circulation—Does not circulate to inmates: requests for staff should be marked "Staff" with name.

Your cooperation and assistance will help us give the best possible service with limited staff and time.

Please: Do not request anything not listed above, except for 'Staff'.

Do not send in more than 5 requests per man each week; or more than one request for a particular volume: we only have one copy.

Mark volume number and abbreviation of title in the upper left-hand box marked 'Call number', with one card for each volume.

Sort cards by report title and volume number, from low to high.

Send in all your requests together once a week.

Thank you

"Volumes lacking from prison library collection
July 1967

Title	*Volumes Missing*
CA	29, 103
CA 2d	45, 112
C	29, 49, 61, 74, 83, 101, 152
C 2d	5, 6, 28, 44, 52, 55, 58, 62
C Rptr	5, 8, 14, 26
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(App. 49-51)

QUESTION PRESENTED

The California Attorney General, for the appellants, has alleged that the question presented is as follows:

> "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries, or, alternatively, provide inmates with professional or quasi-professional legal assistance?"

Appellees respectfully submit that the question alleged by appellants is not presented by the opinion below. If the opinion raises a question for argument, it is *whether the state has a federal constitutional duty to provide indigent prison inmates access to a minimum amount of legal research materials necessary to insure that these indigent inmates have effective access to the courts, and access essentially equal in effectiveness to the access to the courts enjoyed by affluent inmates.*

STATEMENT OF THE CASE

Over four years ago, on September 19, 1966, the Director of Corrections of the State of California, promulgated Department of Corrections Transmittal Letter 26/66. The regulations promulgated by this letter included what is now California Department of Corrections Administrative Manual Paragraph 330.041, which forbade any California prison or penal institution from having any other than twelve named law books in the prison library. Books and opinions in excess of those allowed were to be removed and destroyed. Claimed purposes of these regulations (as stated in the District Court in the defendants' Notice of Motion and Motion to Strike Prayer for Damages, to Dismiss, and for Summary Judgment (R. 196)) were to preclude inmate practice of law for favors and to discourage inmate requests for transfers to institutions with larger law libraries.

Other claimed purposes (as stated in the District Court in the defendants' Memorandum of Law upon Issues Submitted to the Three-Judge Court by Stipulation filed Feb-

ruary 9, 1970) were to "equalize the opportunities available to all inmates, in whatever institution they were incarcerated, to have access to legal materials." The "equalization" attempted called for *removing* legal research materials so that no inmate could have access to more materials than any other.

Four inmate complaints, seeking, *inter alia*, relief from enforcement of these regulations, were filed by three inmates of San Quentin Prison including inmate Robert O. Gilmore, Jr., and one inmate of Folsom Prison. Inmate Gilmore's complaint contained the signatures of 88 other San Quentin inmates, as co-plaintiffs (R. 1).

The District Court, on January 10, 1967, granted permission to filed *in forma pauperis*, and consolidated the four cases according to Fed. R. Civ. P. 42, because they contained common questions of law and fact. In the same order the District Court, "because these actions raise important questions in the access of prisoners to the courts," appointed counsel for the plaintiffs (R. 70).

Appointed counsel filed a motion for preliminary injunction and an amended complaint (App. 11-25), which attacked the above-mentioned prison regulations concerning the contents of prison libraries, as well as, and in conjunction with, the State Law Library regulations limiting the lawbooks available to inmates, and the prison regulations restricting inmates from giving or receiving legal assistance to or from other inmates.

Plaintiffs moved for the convening of a three-judge District Court under Title 28, United States Code, section 1292(b). (App. 26-27). On appeal the order denying the motion was reversed, and a three-judge District Court was ordered convened. Defendants petitioned for Writ of Certiorari for a review of the reversal, but this Court, after requesting opposition to the petition, denied the petition for Writ of Certiorari. 393 U.S. 1092 (1969).

Plaintiffs and defendants filed a "Stipulation of Settled Statement of Issues" on February 9, 1970, which comprises

all the issues in the case which were properly presented to a three-judge District Court, and not to a single judge, or a single judge and jury. (App. 33-91). Briefs were filed and oral argument was heard.

The American Civil Liberties Union of Northern California was given leave to enter an appearance as *amicus curide*, and filed a brief in the District Court in support of plaintiffs' position on the said "Stipulation of Settled Statement of Issues."

On May 28, 1970, the three-judge District Court filed their decision, dated May 26, 1970, entitled "ORDER GRANTING RELIEF." (App. 92-106; 319 F. Supp. 105). It is that decision which is before this Court on this appeal, and it is that decision which we here defend.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit is a final judgment on the question of the jurisdiction of the three-judge District Court in this case. Although the appellants in this case (defendants below) petitioned for certiorari and review of the decision of the Ninth Circuit, certiorari was denied by this Court, after asking for, and receiving, opposition to the petition for certiorari. (See No. 626, October Term, 1968. *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968), *cert. denied* 393 U.S. 1092 (1969).)

Convening a three-judge District Court was required by statute in order to grant the relief contained in the order which is here appealed from. The defendant State officers *could not waive the statutory requirement for the three-judge* District Court, because a single judge would have been without jurisdiction to grant the relief which was granted.

A three-judge District Court must be convened when an injunction is sought against a state's administrative regula-

tion, having statewide application, on grounds raising substantial questions of federal constitutional law. Substantial questions are those which are not obviously without merit, or not clearly foreclosed by previous decisions of this Court. In view of the serious consideration given by the courts below to the questions presented by the plaintiffs (appellees here), it cannot be said that these questions are obviously without merit. This Court has not rendered any decisions which clearly decide the issues raised by the plaintiffs in the District Court. Accordingly, a three-judge court was required to consider the injunctive relief sought by the plaintiffs.

The court below ordered the defendant State officers to amend their regulations dealing with lawbooks in the prisons, so that inmates would not be restricted to only the twelve legal references allowed by the regulations. The court ordered amendments which would insure that inmates would have the opportunity to use the legal research "tools" which are required for meaningful access to the courts. The Fourteenth Amendment compels the relief granted.

The Fourteenth Amendment compels a state not to deprive indigent prison inmates of opportunity to have access to the courts which is equal to the opportunity had by affluent prison inmates. Access to the courts is a fundamental element of due process of law. Access to the courts is meaningless without the "tools"—legal research materials or counsel—which make it effective. Ineffective access is not real access to the courts. The prison inmate who can hire counsel, or buy lawbooks, has better protection of law than the indigent inmate who cannot hire counsel or buy lawbooks, and who is left to the eleven named lawbooks to which California's prison libraries are restricted.

Although the California Attorney General argues that lawbooks and counsel are unnecessary for effective access to the courts in post-conviction remedy proceedings, it is clear, and the District Court judicially noticed, that real

access to the courts means that prison inmates must have an opportunity to have assistance—either counsel or research materials—so that their petitions and complaints "will in fact be fully considered by the courts" (App. 101). The blank forms which California provides to prisoners for habeas corpus petitions, are not guarantees of effective access to the courts.

The relief ordered by the District Court is squarely in line with the indigent-appellant equal protection decisions (*e.g., Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)), and with the deference for the security of the Great Writ contained in *Johnson v. Avery*, 393 U.S. 483 (1969).

The relief granted by the District Court was within the total scope of relief asked for by the plaintiffs (appellees here), and is permitted by the Federal Rules of Civil Procedure even had it not been requested in the pleadings. The Stipulation of Settled Statement of Issues suggested relief which might be granted by the court below, on a given finding, but the suggested relief was not binding on the court.

The Eleventh Amendment does not bar the relief granted, which enforces rights granted by the, later, Fourteenth Amendment. State officers may be sued to enforce rights granted by the Fourteenth Amendment without violating the sovereign's immunity and notwithstanding the fact that the judicial enforcement of such rights may have the eventual effect of requiring an expenditure of state moneys. But, even so, in this case there is no evidence in the record which would show that an additional State legislative appropriation would be necessary to comply with the order of the District Court.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THE INSTANT APPEAL

A. The Jurisdiction of the Three-Judge Court Is Res Judicata

We, appellees here and plaintiffs below, most strongly join in the arguments made by the appellants (defendants below) on the issue of *res judicata*.

On *March 14, 1967*, plaintiffs filed a motion for preliminary injunction and a motion for the convening of a three-judge district court pursuant to Title 28, United States Code, section 2281. The motion for the convening of the three-judge court was denied on July 6, 1967, but plaintiffs were allowed to take an appeal of the denial pursuant to Title 28, United States Code, section 1292(b).

The United States Court of Appeals for the Ninth Circuit, on August 16, 1968, reversed the order denying the motion for the convening of a three-judge court, and ordered "further proceedings looking toward the convening of a three-judge court." *Gilmore v. Lynch*, 400 F.2d 228, 231 (1968).

Defendants, now the appellants in this Court, then petitioned this Court for writ of certiorari to review the decision of the Court of Appeals. We, the plaintiffs below and now the appellees here, did not at first file any document opposing the petition for certiorari. *But this Court requested that we file written opposition*, and we thereupon filed a brief in opposition to the granting of the petition for writ of certiorari. That brief should be part of the Court's records under No. 626, October Term, 1968.

Accordingly, the question of jurisdiction of the three-judge court has been before this Court, and this Court considered it important enough to request that written opposition to the petition for certiorari be submitted. Such opposition was submitted. The petition for certiorari was

denied. Accordingly, the judgment ordering the convening of a three-judge court is a final judgment in this case.

B. Only a Three-Judge Court Had Jurisdiction To Consider the Injunctive Relief Which Was Requested, and To Grant the Relief Which Was Granted. A Single Judge Would Have Been Without Jurisdiction.

Title 28, United States Code, section 2281, provides that an injunction restraining the enforcement of an order made by an administrative board or commission acting under state statutes, shall not be granted by any district court upon the ground of unconstitutionality unless the application for the injunction is heard by a three-judge court.

Whenever there is an attack on constitutional grounds in federal court on a state administrative order, promulgated pursuant to authority granted by statute, section 2281 applies if the order is of general, statewide application. *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923); *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953); *McCormick & Co. v. Brown*, 52 F.2d 934 (4th Cir. 1931), *affirmed* 286 U.S. 131 (1932).

Under such circumstances section 2281 applies even if the constitutionality of the statute, which creates the authority to make the order, is not attacked. *Oklahoma Natural Gas Co. v. Russell, supra.*

In *Hatfield v. Bailleaux*, 290 F.2d 632, 635 (9th Cir. 1961), which was a case dealing with prison regulations pertaining to lawbooks, the Court of Appeals for the Ninth Circuit said:

> "Where the effort is to enjoin the enforcement, operation or execution of an administrative order of general application representing considered state policy, an attack on the constitutionality of such an order calls section 2281 into play." (Citing, *inter alia* in footnote 4, *Alabama Public Service Commission v. Southern R. Co.*, 341 U.S. 341, 343 note 3

(1951), and *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 292 (1923).)

The *Hatfield* court went on to hold that there was no requirement for a three-judge court because

> "the orders [there] challenged, while promulgated pursuant to authority confessed by statute, [were] not of general state-wide application and [did] not represent state policy." 290 F.2d at 635.

The order, in this case, consists of prison regulations promulgated by the California Difector of Corrections, a single individual. "A single individual . . . may constitute a state administrative board or commission within the meaning of the act [28 U.S.C. § 2281]." *McCormick & Co. v. Brown*, 52 F.2d 934, 937 (4th Cir. 1931), *affirmed* 286 U.S. 131 (1932).

In this case the prison-lawbook regulations promulgated by the California Director of Corrections have general, statewide application; they apply to all of California's prisons. And they are promulgated pursuant to authority granted by statute. See California Penal Code, sections 5050, 5054, 5058.[1] The appellants have argued below that the prison-lawbook regulations were "quasi-legislative" in nature. (This characterization was made in the course of an attempt to argue that the Director of Corrections was immune from liability for promulgating the lawbook regulations.[2]) Certainly the prison-lawbook regulations comprise

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[1]Cal. Penal Code § 5050 provides: "The office of Director of Corrections is hereby created."

Cal. Penal Code § 5054 provides: "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director."

Cal. Penal Code § 5058 provides: "*The director may prescribe rules and regulations for the administration of the prisons and may change them at his pleasure.*" (Emphasis added.)

[2]This argument may be found in the defendants' Notice of Motion and Motion to Strike Prayer for Damages, to Dismiss and for Summary Judgment, filed in the District Court (R. 206).

the considered legislative policy of the State of California. A three-judge district court is, accordingly, required to enjoin the enforcement of such regulations on the ground that they are unconstitutional.

C. A Three-Judge District Court Would Not Have Been Required if the Attack on the Prison-Lawbook Regulations Did Not Involve One or More Substantial Questions of Constitutional Law. The Attack on the Prison-Lawbook Regulations Did Involve Substantial Questions of Federal Constitutional Law.

Notwithstanding the requirements of Title 28, U.S. Code, section 2281, this Court has held that it is not necessary to convene a three-judge district court when an application is made to enjoin the enforcement of a state statute or a state administrative order promulgated pursuant to statute, if the application for injunctive relief does not raise a substantial federal constitutional question. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933). In *California Water Service Co.* the Court has supplied criteria to be applied in determining whether a substantial constitutional question is raised: In order to be *a substantial* constitutional question the constitutional question must meet two requirements: (A) It must not be obviously without merit. (B) It must not be clearly unsound measured by *previous decisions of the Supreme Court.*

The constitutional questions raised in this case obviously cannot be attacked on the basis of failure to meet criterion (A) stated above. In view of the decision of the Court of Appeals for the Ninth Circuit, directing the convening of a three-judge district court (400 F.2d 228), and in view of the decision of that three-judge District Court, which is here appealed from, it cannot be said that the constitutional questions raised by appellees (plaintiffs below) are "obviously without merit."

Neither are the constitutional questions concerning access to the courts, raised by appellees (plaintiffs below), clearly unsound as measured by any previous decisions of the Supreme Court. There are none which are decisive in the case at bar on the constitutional questions concerning access to the courts. Second, previous decisions of the Supreme Court do not decide the constitutional questions of denial of equal protection of the laws to indigent prisoners, which questions are raised in our application for injunctive relief.

In the court below, plaintiffs and defendants filed a Stipulation of Settled Statement of Issues for decision by the three-judge district court. In that Stipulation the following five issues were presented:

> "1. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional infringement on prisoner access to the courts in so far as these rules and regulations affect indigent State prisoners?
>
> "2. Are the present State-wide rules and regulations of the California Department of Corrections, governing access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments, and pleadings, an unconstitutional deprivation of equal protection of the laws in so far as these rules and regulations affect indigent State prisoners?
>
> "3. Are the present State-wide rules and regulations, governing legal assistance, given by one State prisoner to another in California penal institutions, a violation of the rule of *Johnson v. Avery*, 393 U.S. 483 (1969)?
>
> "4. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of access to the courts

in so far as these rules and regulations affect indigent State prisoners?

"5. Are the present State-wide rules and regulations governing access by prisoners in California penal institutions to books in the State law library, an unconstitutional deprivation of the rights of indigent prisoners to equal protection of the laws?"

Until *Johnson v. Avery*, 393 U.S. 483 (1969), the Supreme Court had not spoken for 27 years on the question of the definition of access to the courts for indigent inmates submitting personally drawn documents to the courts. In 1941 the Court decided *Ex parte Hull*, 312 U.S. 546, wherein the Court held invalid a prison regulation which prohibited the sending of legal petitions to courts unless the petitions were approved by the warden. *Id.* at 549. In a footnote to *White v. Ragen*, 324 U.S. 760 (1945), the Court referred to *Hull* in taking incidental note of unspecified practices of an Illinois warden which "denied the rights of prisoners to access to the courts . . . ." *Id.* at 762, fn. 1. In *Johnson v Avery, supra*, the Court held invalid a prison rule prohibiting inmates from assisting other inmates in preparing legal petitions. In the absence of *some other effective means of assistance* such a rule infringed upon the right of access to the courts. 393 U.S. 486-87.

Aside from *Hull's* limited ruling on submission of petitions to courts, and *Avery's* limited ruling on inmate assistance to other inmates in preparation of legal petitions, the Supreme Court has not spoken on the issue of just what access to the courts, for indigent inmates, means and includes. The question of whether the indigent inmate's right of access to the courts includes the right to obtain and use lawbooks, without a warden's approval, has not been touched upon even by implication. Certainly then, the constitutional questions raised by the plaintiffs below, concerning access to the courts, are not clearly unsound as having been settled "*from the previous decisions of [the*

Supreme] Court [so] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Ex parte Poresky, supra,* at 32; *California Water Service Co. v. City of Redding, supra,* at 255. (Emphasis added.)

It is obvious that an indigent inmate has no funds with which to hire an attorney. The complained of regulations were found by the court below to interfere with or cut off the indigent inmate's access to the courts. A rich inmate could obtain effective access to the courts notwithstanding the regulations, since the rich inmate could hire an attorney who could do legal research and obtain the process of the courts to enforce the rights of the rich inmate who hired him. But the indigent inmate is critically affected by the complained of regulations; they make his access to the courts ineffective access at best.

The Supreme Court has not spoken on the issues of denial of equal protection which are raised here. The plaintiffs below have raised issues of denial of equal protection by the regulations complained of. This Court has extensively defined the right of indigent defendants to equal protection *during trial and the process of appellate review.* See *Williams v. Oklahoma City,* 395 U.S. 458 (1969); *Roberts v. LaVallee, Warden,* 389 U.S. 40 (1967); *Entsminger v. Iowa,* 386 U.S. 748 (1967); *Anders v. California,* 386 U.S. 738 (1967); *Swenson, Warden v. Bosler,* 386 U.S. 258 (1967); *Lane v. Brown,* 372 U.S. 477 (1963); *Douglas v. California,* 372 U.S. 353 (1963); *Burns v. Ohio,* 360 U.S. 252 (1959); *Griffin v. Illinois,* 351 U.S. 12 (1956); *Cochran v. Kansas,* 316 U.S. 255 (1942). Although these cases are extensive in their definition of rights of the indigent, these cases do not deal with such post-conviction remedy proceedings as petitions for writs of habeas corpus and actions under the Civil Rights Act of 1871 (Title 42, United States Code, sections 1983-86). With regard to the right of the indigent habeas corpus petitioner to equal protection, this Court appears only to have touched on the transcript and

filing fee aspects of the indigent's disadvantage. See *Gardner v. California*, 393 U.S. 367 (1969); *Long v. District Court*, 385 U.S. 192 (1966); *Smith v. Bennett*, 365 U.S. 708 (1961). The Supreme Court has not decided the constitutional questions involving equal protection which the plaintiffs raised below. Therefore these constitutional questions are not foreclosed by previous Supreme Court decision. Therefore, these constitutional questions are *substantial* questions according to the standards established in *California Water Service Co. v. City of Redding*, *supra*, and *Ex parte Poresky*, *supra*.

D. The Requirement of 28 U.S.C. § 2281 for the Convening of a Three-Judge Court Is Not Waivable by Defendant State Officers

As we pointed out when this case was previously before this Court on the issue of convening of a three-judge court, the language of Title 28, U.S. Code, section 2281 appears to be jurisdictional. This Court so held in *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930). The statute declares that a requested injunction, restraining the enforcement of state statutes or administrative orders pursuant to the authority granted by state statutes, "shall not be granted . . . unless the application therefor is heard and determined by a district court of three judges . . . ."

Defendant State officers certainly are not prejudiced by not being allowed to waive the three-judge court requirement. In the first place it is the plaintiffs, not the defendant State officers, who have been severely prejudiced in this action. If there had been no litigation concerning the convening of the three-judge court, this matter would have been decided, in the District Court, on the merits well over three years ago.

Not allowing the defendant State officers to waive the jurisdictional requirement of the statute does not prejudice any right of appeal of defendant State officers. This court expressly made provision in *Moody v. Flowers*, 387 U.S. 97, 101-02 (1967), for an appeal to the Court of Appeals when a case reached this Court, coming from an improperly con-

vened three-judge district court. This Court made express provision for an appeal to the Court of Appeals even if the time had passed for the taking of an appeal to the Court of Appeals. If a three-judge district court is improperly convened it has been held that the three-judge court will be treated as merely having acted as a normal district court wherein three judges, instead of one, are sitting. *O'Malley v. United States*, 128 F.2d 676, 687 (8th Cir. 1942), reversed on other grounds *sub nomine Pendergast v. United States*, 317 U.S. 412 (1942); *Dyer v. Rich*, 259 F. Supp. 736 (N.D. Miss., Greenville Div. 1966); *Swift & Co. v. Wickham*, 230 F. Supp. 393, 410 (S.D. N.Y. 1964), *appeal dismissed* 382 U.S. 111 (1965).

Certainly the convening of a three-judge district court in this case will not serve as a precedent which will cause any rash of convenings of three-judge courts, because the test of substantiality of constitutional question, in accordance with the standards set forth in *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938), and *Ex parte Poresky*, 290 U.S. 30 (1933), will serve as an adequate barrier to the convening of a three-judge court when the question involved is sham and frivolous.

II. THE CONSTITUTION DOES COMPEL A STATE TO INSURE THAT AN INDIGENT PRISON INMATE HAVE THE OPPORTUNITY TO USE THE RESEARCH TOOLS THAT ARE NECESSARY FOR EFFECTIVE ACCESS TO THE COURTS

As stated above, the question presented by the judgment of the court below is not the question alleged by the State officials who are here appealing. The question presented, first, is restricted to the effect of the State prison regulations upon *indigent* prisoners, not prisoners in general. Second, the judgment below requires that *some* action be taken to insure that indigent inmates have the same opportunity to utilize the minimum amount of legal research materials necessary to insure an access to the courts that is

essentially equal to the access to the courts enjoyed by affluent inmates.

If someone trained in the law is available to assist, counsel and advise an inmate, the inmate can obtain access to legal research materials through this second party, and under such circumstances it might not be necessary for a state to provide access to legal research materials for indigent prisoners. But some means of providing access to legal research materials is essential if indigents, who cannot retain counsel, are to have access enjoyed by the affluent who can retain counsel.

Without access to legal research materials an inmate may never be able to have, for example, a potentially meritorious habeas corpus petition considered by the courts, because he may not know what facts are legally significant; he may not know what facts constitute grounds for issuance of a Writ of Habeas Corpus. If he is unable to find out what is the legal significance of the factual background of his case he is effectively deprived of the right to petition for the Great Writ.

The California Attorney General argues that "prison inmates are ill-equipped . . . to utilize . . . the arcane tools of the lawyer's trade." (Appts. Br. 7). At another point he states "simply that the assistance of counsel is not a necessary part of the concept of access to the courts . . . ." (Apnts. Br. 25). But this latter statement is made shortly after the Attorney General has argued that "since [the indigent inmate] has access to "jailhouse lawyers" to assist him, [*inter alia*] he has no constitutional right to post appellate assistance of counsel at state expense." (Apnts. Br. 25).

First the Attorney General says, inmates should not be allowed to use lawbooks because lawbooks are some kind of mysterious, even "arcane," amulets, charged with a potency of power which only the initiated (lawyers) should be allowed to exercise. But then the Attorney General says that lawyers are "not a necessary part of the concept of access to the courts," and he further embellishes this dis-

cussion of the role, or non-role, of lawbooks and legal materials in the concept of access to the courts, with the statement that because the indigent inmate has access to "jailhouse lawyers" to assist him, he therefore has no need, or constitutional right, to the assistance of lawyers in pursuing his post-conviction remedies.

The primary reason, the Attorney General gives, for the alleged non-necessity for assistance of counsel, or access to legal research materials, in post-conviction remedy proceedings, is that the State has provided some blank forms for inmates to use in preparing habeas corpus petitions. These blank forms are apparently supposed to serve as a complete, adequate, and effective substitute for the assistance of counsel, or access to legal research materials. The Attorney General's argument really boils down to the proposition that knowing the law, or having the opportunity to know it, is not necessary for effective access to the courts. This, we submit, is just not true.

The California Attorney General attempts to buttress his argument, that the legally ignorant, indigent inmate has as effective access to the courts as the affluent inmate who can hire a battery of lawyers, with statements that (1) it has been "our experience . . . that prisoners have little difficulty ascertaining [the facts which should be put in a habeas corpus petition to make it effective]," and that (2) "the habeas petition, in its early stages, should not be tested in the crucible of an adversary proceeding . . . . The attorney for the respondent may, and commonly does, point out authority tending to show that a given petition does not state grounds for relief [but] his role in this regard is primarily to assist the court." (Apnts. Br. 22-23). We submit that the Attorney General is attempting to "assist the court" in purely an adversary way when he "commonly" files a brief opposing the granting of relief.[3]

[3]In *Conway v. California Adult Authority*, 396 U.S. 107 (1969), *reh. denied* 396 U.S. 1030 (1970), this Court had granted certiorari to review a denial of a petition for writ of habeas corpus. However, when the briefs were filed on the merits, the California Attorney Gen-

Of course the habeas corpus petition begins an adversary proceeding, and of course it is an adversary proceeding *from start to finish.* Appellants have patently mis-stated the role of the State's attorneys, in practice, in post-conviction remedy proceedings. The role of the Deputies Attorney General, in practice at least, is to obtain dismissal, on any and every ground possible, of the petition for a writ of habeas corpus.[4] And what is the Attorney General's alle-

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eral, respondent, alleged facts which showed that the issue for which certiorari had been granted did not exist. The writ of certiorari was dismissed as having been improvidently granted. In the opinion dismissing the writ this Court noted that the "imposition on this Court [was] revealed only at this late stage [as] the result of the policy of the Attorney General of California, as explained in the Respondents' brief, to make no response to habeas corpus petitions of state prisoners unless the court in which a petition is filed requests a response, as for example . . . by issuing an order to show cause why the writ should not be granted." 396 U.S. at 110. How does this policy of the Attorney General "assist the court" in which the petition is first filed, and so make the petitioner's need for legal research materials nonexistent? Even if the Attorney General's response to a petition were to be completely impartial and non-adversary, it could not possibly help the petitioner at the earliest, most vital stage when he is attempting to avoid summary dismissal of an arguably meritorious claim, since no response is filed at this stage.

In California the judges to whom petitions are normally first presented, the judges of the Superior Courts, do not have lawclerks. See Krause, *A Lawyer Looks at Writ Writing*, 56 Cal.L.Rev. 371, 372 (1968). Accordingly, it is not feasible for these judges to exhaustively and carefully review the legal significance of every petition. It is clear that "the initial burden of presenting a claim to post-conviction relief usually *rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system.* In the case of all except those who are able to help themselves–usually a few old hands or exceptionally gifted prisoners–*the prisioners is, in effect, denied access to the courts unless such help is available.*" *Johnson v. Avery*, 393 U.S. 483, 488 (1969). (Emphasis added.)

[4]In *In re Smith*, 3 Cal.3d 192 (1970), the petitioner had alleged inadequate assistance of counsel on appeal, but the California Attorney General had responded arguing that no prejudice resulted even if assistance of counsel had been inadequate, because the Attorney General had himself raised and discussed one of petitioner's potential

gation of "our experience" concerning the alleged "little difficulty" of prisoners in ascertaining the facts necessary to state an effective petition for a writ of habeas corpus? Is the Attorney General alleging new facts dehors the record? Whatever is this vague "experience" of the counsel for the appellants, it is not the law, or any constitutional reason for a finding that the blank forms provided in the prisons make lawbooks unnecessary for effective access to the courts.

The Attorney General argues that the odds are against the average prisoner mastering lawbooks, and therefore he should not be exposed to them. Should the odds against the indigent prisoner keep him from the opportunity to ascertain the law, when his liberty or life may be at stake?

The appellants, besides arguing that knowing the law, or having the opportunity to know it, is not necessary for effective access to the courts, also argue that the great line of equal protection decisions which this Court has brought forth for indigent state criminal defendants and appellants, are not "realistic," and have "not proved entirely workable." (Apnts. Br. 27). We submit that whether the California Attorney General thinks those decisions (*e.g., Douglas v. California*, 372 U.S. 353 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956)) are realistic or not, they are well-established and an essential part of our constitutional law. To go back to the unequal protection situation which existed before these decisions, would be a move which would only be recommended by State officials who are so

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claims even though petitioner's counsel had not raised it. The Supreme Court of California rejected such an argument, saying that because the claim was discussed in a "unilateral presentation [in the Attorney General's] brief does not indicate that the court necessarily would have [decided against petitioner] if the point had been adversitively argued by petitioner's counsel. Adoption of the Attorney General's view would dilute the importance of the appellate counsel in the protection of the rights of criminal defendants . . . ." 3 Cal.3d at 203.

short-sighted that they are more interested in balance-sheets and non-disturbance of the tranquil operation of State offices, than they are interested in equal justice and constitutional guarantees which mean what they say.

Equal protection of the laws is one of the most sacred rights we have. This government, and perhaps our whole system of government; is under attack from many quarters, in ways and to degrees which we have not fully experienced before. But it will not be additional penal legislation or a larger F.B.I., or larger police forces that will be the ultimate deciding factor of whether our system of government survives. It will be, and it is, whether we pass the spiritual test of whether or not what we have is worth saving. What we have is not worth saving if there is only a lip-service paid to what are supposed to be our most sacred and valued rights, when we find it inconvenient, for dollar or operational difficulty reasons, to assure these rights to the lowest class in society. Such hypocrisy is a fungus which can fatally attack the roots of our national being.

If one inmate can obtain a reversal of an improper conviction because he has the money, or credit, to hire a lawyer who can use lawbooks, then another inmate should be able to use the same lawbooks. He should not be denied the lawbooks, and consequent relief, just because he has no money or credit.

In the United States, every man has the right to equal access to the courts. Money, or credit, was not written into the Constitution as a criterion of degree of effectiveness of access to the courts. If James Hoffa can pursue all the post-conviction remedies he has pursued, then Robert O. Gilmore, Jr., a pauper, should at least have the opportunity to use the same "tools" which Hoffa's lawyers have used for him, and which, as the court below judicially noticed, are really and in fact essential to effective access to the courts on post-conviction remedy proceedings. Would Sam Sheppard of Ohio have been released without the assistance of someone who knew the law? Would he

have been released merely by filling out California's blank forms?

The decision of the District Court in this case is in harmony with two late leading cases in the area of federal constitutional rights of prisoners: *Johnson v. Avery*, 393 U.S. 483 (1969), and *In re Harrell*, 2 Cal. 3d 675 (1970). In *Avery* this Court stressed that "there is no higher duty than to maintain [the writ of habeas corpus] unimpaired," and that "[s]ince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." 393 U.S. at 485.

In *Harrell* the California Supreme Court commented on the question of adequacy of prison law libraries, as follows:

> "We cannot fail to recognize, however, that the decision of the United States Supreme Court in *Johnson v. Avery* heralds the advent of new principles governing the question of prisoner access to legal materials. Our recognition of this fact is concretized in preceding pages of this opinion wherein we have attempted to develop a flexible standard governing restrictions upon the right of mutual prisoner assistance. Moreover, we are cognizant that the principle of *Johnson* may, in a proper case, require a judicial assessment of the adequacy of prison libraries to permit legal research of a certain minimum degree of effectiveness. *This court has itself recognized that some kind of access to legal materials is necessary to the preparation of any effective application for relief.* '[A]lthough [an application] should ordinarily be predicated on a full and honest statement of the *facts* (*In re Chessman* (1955) 44 Cal. 2d 1, 10 [279 P.2d 24], *In re Swain* (1949) 34 Cal. 2d 300, 302, 304 [209 P.2d 793]), the relevance of certain facts may not be apparent to him until he has done some legal research on the point.' (*In re Schoengarth, supra*, 66 Cal. 2d 295, 305.)" 2 Cal. 3d at 695. (Emphasis added.)

In view of the inadequacy of the record before it in *Harrell*, and in view of the fact that the instant case was pending in the District Court, the California Supreme Court declined to rule on the adequacy of the State's prisons' libraries. 2 Cal. 3d at 695-96.

In commenting on earlier decisions which stood for the proposition that State prison inmates "have no legally enforceable rights to engage in legal research except insofar as such research is necessary to insure access to the courts," the California Supreme Court, in *Harrell*, noted that "that standard . . . conceptually begs the question asked of it . . . ." 2 Cal. 3d at 695.

It is beyond need for further argument that some knowledge of the law is required to effectively state facts sufficient to comprise a habeas corpus petition which is meritorious on its face; it is also beyond argument that some knowledge of the law is required in order to state a claim, meritorious on its face, in an action under the provisions of Title 42, United States Code sections 1983-86 (Civil Rights Act of 1871). Since some knowledge of the law is required to effectively have such proceedings considered by the courts, the State, in governing its prisons, must insure that indigent inmates will have access to the minimum amount of legal research materials necessary to obtain and use the legal knowledge required. The State must afford indigent inmates a sufficient opportunity to use legal research "tools," so that they have the opportunity to obtain access to the courts which is equal in effectiveness to the access enjoyed by affluent inmates who can hire counsel to find and use these "tools" for them. This was the rule stated and applied by the District Court in the decision below. We respectfully submit that this rule is sound, and is compelled by our Constitution.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS NOT LIMITED BY THE SCOPE OF RELIEF SUGGESTED IN THE STIPULATION OF THE PARTIES

In the "STIPULATION OF SETTLED STATEMENT OF ISSUES" (App. 33-91), appellants and appellees (defendants and plaintiffs below) stipulated that all motions which had theretofore been filed, should be considered as filed as part of the settled statement of issues. The parties further stipulated that the three-judge court, which had theretofore been convened in this matter, "*may* decide all such motions heretofore filed in this matter on the basis of the settled statement of issues." (Emphasis added.) The Stipulation was not binding on the court below, and it is not binding on this Court. It bound only the parties, and it was for the purpose of assisting the Court in deciding what the issues were, in an attempt to simplify and condense a great number of pleadings and motions.

After a statement of the issues (of which there were five), the parties stated that they "further stipulate and agree that *the following relief may be granted by the Court, if it please the Court,* if the Court decides the issues above-stated, in the manner indicated." (Emphasis added.) It is quite clear that the relief was, from the very language of the Stipulation, only suggested relief. The court below, itself, never stated that it would be bound by the relief suggested in the Stipulation. There was no official order, of any kind, of the court below, attached to the Stipulation. And the relief which *was* granted by the court below in the "ORDER GRANTING RELIEF" (App. 92-106) falls within the scope of the relief prayed for by the appellees (plaintiffs below) in their various motions for preliminary injunction, and amendments to such motions, and in their amended complaint.

Further, F. R. Civ. P. 54(c) provides that a party shall be granted whatever relief the party is entitled to, in a judgment, even if the party has not demanded that relief in his pleadings.

Appellants argue that the only issues relevant to the instant appeal are Issues Nos. 1 and 2 in the said Stipulation. This is, incidentally, not the case, since the District Court framed its "ORDER GRANTING RELIEF" in such a way as to dispose of *all* the issues presented in the said Stipulation. In order to fully understand the order of the District Court insofar as it affects Issues Nos. 1 and 2, it is necessary to understand the interrelation of all of the issues, and the way the order affected, and was affected by, the other three Issues. The order here appeared from is clearly within the total scope of relief asked for, and is clearly within the discretion of a court of equity.

IV. THE ELEVENTH AMENDMENT DOES NOT BAR THE ISSUANCE OF THE "ORDER GRANTING RELIEF" FROM WHICH THE APPELLANTS APPEAL

The first premise of the California Attorney General is that additional lawbooks, provided for the prisoners, would require specific additional appropriations of the California Legislature therefor. But this is a statement of fact which is far outside the record here on appeal, and which is also questionable. Did the California Legislature pass a specific appropriation for the additional lawbooks required for the prisons when the Director of Corrections issued his original administrative order providing for the twelve expressly-named legal references for the library of each penal institution? When Department of Corrections Transmittal Letter 26/66 was issued, it ordered that prison libraries have only the twelve named legal references. Prison libraries which had additional references had to remove and dispose of them. Prison libraries which did not have the references had to obtain them. Never before, in all the litigation having to do with this case, has there been any reference to specific appropriations measures to buy the additional lawbooks which might be needed. It would appear that the Department of Corrections has discretionary power over the way part, or all, of its appropriations are spent. Accord-

ingly, a specific appropriations measure would not necessarily be required for the implementation of the "ORDER GRANTING RELIEF."

This action sounds in equity. It is obvious that a court of equity will not require a party to perform that which is impossible. If the defendant State officers are unable to provide additional lawbooks without express appropriations, then the Attorney General should have made appropriate representations to the court below. The court below did not order the defendants to go out and buy any specific lawbooks, or to go out and hire any lawyers; the court below simply ordered the defendants to file, with it, "new or amended regulations which accord with the principles expressed" in the decision of that court. (App. 105). The court below further indicated that it would review the proposed new regulations, and would have a full and fair hearing thereon if requested. It is hardly fitting for the Attorney General to now complain, in this Court, that he and his clients cannot comply with the order of the court below for reason of impossibility. Such a reason must ultimately be based on facts, and those facts are properly presented to the District Court, and not to this Court.

The Attorney General cites *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), as alleged authority for the proposition that the Eleventh Amendment bars the relief granted by the District Court in this case. But *Ford Motor Co.* is certainly not authority for such a proposition. *Ford Motor Co.* was a suit by a corporation *for a refund of taxes paid* to the State of Indiana. The plaintiff corporation had sued the State's Treasury, in effect, following the provisions of Indiana law concerning claims for refunds. In deciding the case this Court said that "where relief is sought *under general law* for wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." 323 U.S. at 462. (Emphasis added.)

Ford Motor Co. was not an action filed under the provisions of the Civil Rights Act of 1871 (Title 42, United States Code, sections 1983, 1985), but the case at bar is such an action. The "ORDER GRANTING RELIEF" is not an adjudication that the State's Treasury owes anyone any money. In *Ford Motor Co.*, the plaintiff corporation was asking for just such an adjudication.

The Attorney General attempts to distinguish *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964), by saying that was an action against a county, and county officials only. But in that case this Court said, "it has been settled law since *Ex parte Young*, 209 U.S. 123 (1908), that suits against *state and* county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." 377 U.S. at 228. (Emphasis added.)

(The California Attorney General attempts to distinguish the effects of such decisions as *Griffin v. Illinois, supra,* and *Douglas v. California, supra,* from the decision below in this case, on the basis that those cases were direct review of criminal convictions. The Attorney General distinguishes the present case because it is a civil action. He apparently argues that the federal courts cannot grant relief requiring State expenditures in a civil action, but they can grant relief, which has the effect of requiring State expenditures, in criminal actions, or in proceedings on petitions for writs of habeas corpus (and presumably petitions for writs of error coram nobis, etc.). Even if such a distinction were valid, and controlling, which is not the case, the case at bar should not be considered as a run-of-the-mill "civil" action. This action was brought, first, *in propria persona,* by indigent inmates for the purpose of protecting and securing their rights to pursue post-conviction remedies which include petitions for writs of habeas corpus. Perhaps such an action as this one is somewhat of a hybrid, but in any event equity looks to substance, and not to form, and basing a denial of relief in an action such as this one, on a dessicated categorization of forms of action, would be

the kind of tragic legal action which led, in old England, to the development of the Chancellor's court, because of the limited and stultifying scope of the forms of action at law.)

If there is any conflict between the Eleventh Amendment and attempts, such as in the case at bar, to enforce rights assured by the Fourteenth Amendment, the Eleventh Amendment must yield, since the Fourteenth Amendment is the more recent Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court has jurisdiction to hear the instant appeal, and the order of the District Court appealed from should be affirmed.

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